IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 4-3-2002

Coram:

The Honourable Mr.Justice M. KARPAGAVINAYAGAM

C.R.P. No.2189 of 2001 and C.M.P.No.11724 of 2001
...

K.Manokaran .. Petitioner

vs.

A.U.Subbannan .. Respondent

Civil Revision Petition against the Order dated 3.7.2001 in E.P.No.45 of 2001 in O.S.No.159 of 1997 on the file of the Subordinate Judge, Gobichettipalayam.

! For Petitioner : Mr.P.K.Muthukumar

^ For Respondent : Mr.P.R.Balasubramaian

: O R D E R

Manokaran, the petitioner herein, is the judgment-debtor.

2. The respondent/plaintiff filed a suit in O.S.No.159 of 1997 against the petitioner/defendant and obtained a money decree on 12.12.2000 for Rs.74,576-25. No appeal was filed by the petitioner/defendant against the said money decree. So, the respondent/ploaintiff filed a petition in E.P.No.45 of 2001 under Order 21 Rule 11(2) C.P.C. on 12 .3.2001 praying for the arrest of the petitioner/judgment-debtor under Sections 51 and 55 C.P.C. for the execution of the said decree. The matter came up for final disposal on 3.7.2001. On that date, the petitioner/defendant as well his counsel was absent. Though the counsel entered appearance earlier, no counter was filed till then. Therefore, an order of arrest was passed in the said application on 3.7.20 01. Challenging the same, the petitioner/defendant has filed this Civil Revision Petition.

3. I heard the learned counsel for the petitioner and the respondent.

4. The counsel for the petitioner on the strength of the

decisions in (1) JOLLY GEORGE VARGHESE v. BANK OF COCHIN (AIR 1980 S.C. 470); (2) P.AZEEZ AHMED v. STATE BANK OF INDIA 9AIR 1995 MADRAS 194); (3) MUTHUSWAMY.M. v. SUPASRI CHIT FUNDS (2000 (II) C.T.C. 168); and K.AL.RM.RM.ALAGAPPAN v. RAJAGURU & CO (AIR 1985 MADRAS 353) would strenuously contend that the order of arrest was made without following procedures as contemplated under Section 51 C.P.C. and Order 21 Rule 37 C.P.C.

5. According to the learned counsel for the petitioner, the petitioner should have been given opportunity by calling upon him to show cause as to why he should not be committed to civil prison and in the absence of the said opportunity, the order of arrest is illegal.

6. In this context, it would be relevant to refer to the observation made by the Supreme Court in the decision in JOLLY GEORGE VARGHESE v. BANK OF COCHIN (supra), which is as follows:-

"The simple default to discharge the decree is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal as demand verging on dishonest disowning of the obligation under the decree."

7. The above observation made by the Apex Court has been incorporated and followed in other decisions also.

8. The reading of the relevant provisions and the above observation of the Supreme Court would show that if there is a material to show that the judgment-debtor is a person who is having funds and is evading payment of the decree amount and there is a view of bad faith in the mind of the judgment debtor and he was deliberately attempting not to pay the decree amount, then the Court has power to issue the order of arrest.

9. In this case, admittedly, the decree was passed on 12.12.2000. The judgment debtor did not choose to file an appeal. The execution petition has been filed on 12.3.2001 and notice was issued to the judgment-debtor. On his behalf, an advocate also entered appearance. Ultimately, the matter was taken up for final disposal on 3.7.2001. Till then, no counter was filed. Even on the said date, neither the petitioner/judgment-debtor nor his counsel was present before the court.

10. In that context, the trial Court issued the order of arrest on having satisfied with the means of the judgment-debtor as contained in the affidavit regarding the availability of funds with the judgment-debtor.

11. But, it is seen from the conduct of the petitioner that he

is not only avoiding payment, but also evading his presence before the lower Court.

12. As a matter of fact, while ordering notice of motion in the Civil Revision Petition, this Court on 30.7.2001 directed the petitioner to deposit 1/3rd of the E.P. amount within four weeks from the said date. It is the specific stand taken by the petitioner that there is no neglect or refusal on the part of the petitioner to pay the decree amount as mentioned in Ground No.7 of the Memorandum of Grounds. If that is the stand taken by the petitioner, there is no reason as to why the order of this Court dated 30.7.2001 has not been complied with.

13. The learned counsel for the petitioner, while arguing the matter, would submit before this Court that the petitioner is not having sufficient funds to make the payment. In the affidavit filed along with the revision petition, no such statement has been made. It is never contended either in the memorandum of grounds or in the affidavit that he was not having the means to make payment. In such a situation, this Court is constrained to hold that the petitioner did not choose to contest the execution petition before the lower Court by filing a counter or choose to make payment as per the order of this Court while getting stay of the order of arrest.

14. Furthermore, without moving the very same Court to set aside the exparte order, the petitioner has rushed to this Court by filing the revision against the impugned order of arrest. Even in the affidavit filed before this Court, he has not stated the reason as to why no

counter was filed and why he was not present before the lower court on that date. He merely put the blame on his counsel on record. This shows that he has not come with clean hands before this Court.

15. In a similar situation, this Court made the following observations in a case reported in 200 (IV) C.T.C. 481 (CHINARAJ v. KANTHASAMY):-

"Order 21, Rule 40 C.P.c. prescribes the procedure on the judgment-debtor either appearing in court in obedience to the notice or is brought before Court after being arrested in execution of the decree for payment of money. This provision would say that when the judgmentdebtor so appears or is brought before Court, the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed with the proviso to Section 51 which prescribes that the judgment-debtor; shall be given an opportunity to show cause before he is committed to civil prison. In other words, it can be safely held that there is nothing in the Code which would indicate or compels the executing Court either to give an opportunity to the judgment-debtor or the decree-holder to adduce evidence to have a fullfledged enquiry and

record its reasons in writing before even it passes an order of arrest against the judgment-debtor.

As indicated above, the application has been filed undr Order 21, Rule 10 and 11 C.P.C. requesting to issue notice under Rule 37 and then to issue warrant under rule 38. In respect of that prayer, the executing Court after hearing the counsel for the parties has passed the order impugned issuing warrant under Rule 38. In other words, it is clear that the impugned order cannot be construed to be the order passed under Order 21, rule 40 C.P.C. It this order is established to be an order under Order 21, Rule 40 of the Code, then it would certainly be wrong, for the reason, ordering detention of the judgmentdebtor should be only after making an enquiry after giving opportunity to both parties to adduce evidence in order to decide as to whether the judgment-debtor was liable to be detained in civil prison in execution of the decree. But, as indicated above, there is nothing to show that in the present case, the order of arrest passed by the executing Court was one made under Order 21, Rule 40, since the order was passed only under Rule 38.
... ...
In the light of the above discussion, it shall be held that the order of arrest passed by the executing Court without conductingenquiry as provided in Rule 40 and without giving a finding with regard to the means of the judgment-debtors, is not one without jurisdiction, as the order of arrest is only under Order 21, rule 38 C.P.C. therefore, I do not find any illegality in the impugned order.
... ...
Whatever it is. Since I take the view that the impugned order has been passed under Rule 38, the question regarding the means to pay and other opportunity to adduce evidence by both the parties before the Court, would arise only when the final order is passed under Order 2 1, Rule 40 C.P.C. after the petitioners were arrested and brought before the Court. therefore, the petitioners are liable to be arrested and brought before the Court to enable the Court to take further course of action for recovering the decree amount."

16. These observations would squarely applicable to the present case also.

17. In the present case, this is only an order of arrest and not an order of detention. The order of detention of the judgment-debtor should be made only after giving opportunity to both the parties. Therefore, I do not find any illegality in the impugned order. So, the petitioner can be arrested and brought before the Court concerned, which,

in turn, will give opportunity to both the parties by following the relevant provisions and pass orders regarding the necessity of the detention of the judgment-debtor in civil prison.

18. In the result, the Civil Revision Petition is dismissed. Consequently, C.M.P.No.11724 of 2001 is closed.

4-3-2002
Index: Yes (I)
dpp

To

The Subordinate Judge, Gobichettipalayam.
dpp
KARPAGAVINAYAGAM, J.

Order in
C.R.P. No.2189 of 2001; &
C.M.P.No.11724 of 2001.

4-3-2002